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Brief of Beale for Respondent

SUPREME COURT OF THE UNITED STATES.

Filed April 5, 1902.

OCTOBER TERM, A. D. 1901.

ALICE A. CABLE, Administratrix, etc., vs. THE UNITED STATES LIFE INSURANCE COMPANY IN THE CITY OF NEW YORK,	Petition for a Writ of Certiorari to the Circuit Court of Appeals for the Seventh Circuit.

BRIEF AND ARGUMENT OF WILLIAM G. BEALE ON BEHALF OF RESPONDENT, IN OPPOSITION TO THE GRANTING OF SAID PETITION.

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IN THE

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STATEMENT.

The record submitted consists practically of two parts containing the two distinct records in the Circuit Court of Appeals, bound together. The first part, with paging in Roman numerals from I to XLIX, is the record on the first appeal to that court from the decree of the Circuit Court sustaining a demurrer to the bill and dismissing the bill; and the second part, with paging in Arabic numerals from 1 to 180, is the record on the second appeal to the Circuit Court of Appeals from the decree of the Circuit Court in favor of respondent on final hearing. Each part is separately indexed, immediately preceding

its first page. The opinions on the two appeals are shown, respectively, at pages XXVIII–XLVII and 163–180.

On the 11th day of May, 1899, respondent filed in the Circuit Court of the United States for the Northern District of Illinois its original bill for the cancellation of an insurance policy, and for an injunction against a threatened action at law upon the policy. On the same day a motion for a preliminary injunction was filed, application was made and granted for a temporary restraining order pending a hearing upon the motion, and a chancery subpoena was issued and served upon petitioner. Likewise, upon the same day, but about an hour, or an hour and a half before the filing of the bill, the threatened action at law was begun in a state court of Illinois, the Superior Court of Cook County, in said district, and four days later the summons in the action was served upon the respondent. Subsequently, an amended and supplemental bill was filed, the supplemental matter showing the action at law. A demurrer was interposed to this amended and supplemental bill, and upon argument it was sustained, the motion for a preliminary injunction was denied, the temporary restraining order was vacated, and the bill was dismissed. Upon appeal the decree dismissing the bill was reversed, and the suit proceeded to a final hearing. The motion for a preliminary injunction was never renewed, no injunction was ever issued, and there has been no interference by the Federal court with the prosecution of the action at law. Upon final hearing a decree was rendered in favor of the respondent (*Rec.*, 147), and this was unanimously affirmed in the Circuit Court of Appeals, where, however, one of the judges made a non-committal reservation upon the question of jurisdiction settled by the first appeal, in which he had not participated. (*Rec.*, 180.)

The petitioner claims (*Petition, p.* 12), that the record presents two special questions calling for the extraordinary interposition of this court by the writ of *certiorari*. One of them—the second one—relates to the merits of the case, upon which four judges have concurred—or rather, it may be said, *six*, for five different judges sat in the Circuit Court of Appeals on the two appeals, and Judge BUNN delivering the opinion of the court in the first appeal, said of the facts afterwards proved: "The fraud perpetrated is something quite appalling in the baldness and boldness of its outlines."

This unanimity of opinion on the part of so many judges below is sufficient in itself to create a strong presumption against the existence of any ground requiring this court to review the merits of the decree. And the decree will be found abundantly supported upon even a cursory examination of the record. This second question suggested is not a question of law, but manifestly one to be answered in accordance with the special facts appearing. The answer of the petitioner to the amended and supplemental bill averred that the "true condition" of the insured "was fully told and made known" to the respondent prior to the delivery of the policy, and that the death of the insured was not occasioned by pneumonia. The decree sought to be reviewed, and the decision of the Circuit Court of Appeals sustaining it, both proceed upon the ground,—directly contrary to the assumption contained in the alleged question,—that, in fact, there was *not* notification to the respondent of *the illness* of the applicant for insurance by the person who procured the delivery of the policy when the applicant lay upon his death-bed in the throes of acute pneumonia. The Circuit Court was unwilling to find the fraud

intentional, but no such unwillingness actuated the Circuit Court of Appeals, which went further and said:

(*Rec.*, 178.) "It is, however, urged that sufficient information was disclosed by Lord to McCabe to put the company upon inquiry, and that, with such notice, McCabe delivered the policy and received the premium; that McCabe was the agent of the company and notice to him was notice to the company, and the delivery of the policy constituted a waiver of the condition and warranty. Upon the assumption that McCabe was such agent of the company and that his action must be treated as the action of the company—questions which we do not determine—it becomes us to inquire of the sufficiency of the notice given, and whether the act of delivery of the policy involved a waiver of the warranty. * * *"

(*Rec.*, 180.) "It cannot here be doubted that if the insurance company or McCabe as its agent had been informed of the fact, within the personal knowledge of Lord, that Cable was seriously ill with acute pneumonia, the policy would not have been delivered. It is difficult for us to believe that Lord, with that knowledge, could think he had a right to accept this policy; but whether so or not, the concealment of the fact was a fraud upon the company. The statement made was deceptive and misleading, whatever were the intentions of Lord, and a court of equity ought not to permit the completion of the wrong. Courts of equity cannot sustain an insurance upon the life of a dying man, when the nature of his malady and the seriousness of his illness are concealed from the insurer."

The first question put forward by petitioner, and obviously deemed by her counsel to be the more important one, is stated in the petition (p. 12), to be the following:

"The fundamental question of the right of a foreign insurance company to bring a suit in equity in the United States courts to cancel a policy of insurance issued by it after loss has occurred upon the policy and after suit has been brought upon the policy in a state court, where the statute of the state forbids a removal of such action at law to the Federal court under penalty of forfeiture of the

license of the insurance company to do further business in the state."

The general question thus stated is interesting and important, but in the view of counsel for respondent it is not the question presented on this record. No such general question necessarily has to be decided. The precise question presented for decision, as counsel for respondent conceive it, is whether the record shows error on the part of the courts below, in taking and retaining equitable cognizance of the controversy, or otherwise, in such manner or with such result as to call for the extraordinary interposition of this court by *certiorari*. All other questions are subordinate and incidental. The state statute against removal is only one jurisdictional element, though an important one.

BRIEF AND ARGUMENT.

I.

It has been many times decided that the issuance of writs of *certiorari* to review final decisions of Circuit Courts of Appeals is discretionary; and that the authority to issue such writs should be exercised sparingly and with great caution, and only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision.

Where a possible error sought to be corrected by *certiorari* is not specially important in its immediate effect upon essential rights, nor specially far reaching in its consequences, this court has uniformly refused to issue the writ.

Smith v. *Vulcan Iron Works*, 165 U. S., 518, 526.

American Construction Company v. *Jacksonville, T. & K. W. Ry. Co.*, 148 U. S., 372, 383, 385, and other cases therein cited.

II.

Upon the merits this case has been correctly decided and the only real question in it—the only one affording reasonable ground for discussion—is whether error was committed in taking jurisdiction of it in equity.

III.

Under the special circumstances shown by the record a resort to equity was proper. The respondent did not have a "plain, adequate and complete" remedy at law, as such remedy is understood in the Federal courts. Its constitutional right to have its case tried in a Federal court of law had been hampered, embarrassed and practically destroyed by an Illinois statute. It was liable to a multiplicity of suits, and to a loss of evidence through lapse of time.

IV.

It is not sufficient that a suitor may have a legal remedy in a state court, otherwise state legislation by extending legal remedies might destroy all equitable jurisdiction on the part of Federal courts. The "plain, adequate and complete" remedy at law which is a bar to equitable relief in a Federal court must exist on the law side of the same court.

Smyth v. *Ames*, 169 U. S., 466, 516.

Mississippi Mills v. *Cohn*, 150 U. S., 202, 205–6.

Niagara Fire Ins. Co. v. *Cornell*, 110 Fed., 816.

Coler v. *Board of Commissioners*, 89 Fed., 257.

Mayer v. *Foulkrod*, 4 Wash. Circ. Ct., 349 (16 Fed. Cas., 1231).

Bean v. *Smith*, 2 Mason, 252 (2 Fed. Cas., 1143, 1150).

Stanton v. *Embry*, 46 Conn., 595.

V.

Though respondent might, upon learning of the action at law brought against it, have abandoned its bill and removed the action at law to the Federal court, that course would have been fraught with danger in consequence of the Illinois statute against removals under which a controversy with the state authorities and an attempted revocation of respondent's license would have been certain to follow.

The statute is repugnant to the Federal Constitution and void, along with the agreement not to remove required by it.

Barron v. *Burnside*, 121 U. S., 186.

Southern Pacific Co. v. *Denton*, 146 U. S., 202, 207.

Galveston, etc., Railway v. *Gonzales*, 151 U. S., 496, 502.

Barrow Steamship Co. v. *Kane*, 170 U. S., 100, 111.

Blake v. *McClung*, 172 U. S, 239, 255.

Chattanooga R. & C. Co. v. *Evans*, 14 C. C. A., 116, 120; 66 Fed., 809, 814.

Metropolitan L. Ins. Co. v. *M'Nall*, 81 Fed., 888.

Mut. L. Ins. Co. of N. Y. v. *Boyle*, 82 Fed., 705.

Commonwealth v. *E. Tenn. Coal Co.*, 30 S. W., 608 (Kentucky).

Commonwealth v. *Jellico Coal Min. Co.*, 30 S. W. Rep., 611 (Kentucky).

And see, also,

Dayton Coal & Iron Co. v. *Barton*, 22 Sup. Ct., 5; — U. S. —, decided Oct. 21, 1901.

But the existence of the statute and the attitude of the state authorities with respect to it prevented respondent from having a "plain, adequate and complete" remedy at law.

Lewis v. *Cocks*, 23 Wall., 466, 470.
Root v. *Railway Co.*, 105 U. S., 189, 216.
Kilbourn v. *Sunderland*, 130 U. S., 505, 514–5.
Smith v. *Am. Nat. Bank*, 32 C. C. A., 368, 376; 89 Fed., 832.
Pacific Express Co. v. *Seibert*, 44 Fed., 310, 315.
Bank of Kentucky v. *Stone*, 88 Fed., 383, 391.

Material portions of the Illinois statute are as follows:

"§ 1. *Be it Enacted by the People of the State of Illinois, represented in the General Assembly:* It shall not be lawful for any insurance company, association or partnership, incorporated by, or organized under the laws of any other state of the United States, or of any foreign government for the purpose of insuring against loss or damage by fire, or against the risks of inland navigation or transportation, or for the purpose of life insurance, or for the purpose of insuring persons against accidents, to take risks or to transact any business whatever, authorized by its charter within this state, until it shall have complied with the following requirements, in addition to those already imposed by existing law: It shall first file with the auditor of public accounts a written application for a license to do business in this state, duly signed by its president and secretary, with its corporate seal attached, which statement shall contain the following

declarations: that it desires to transact the business of insurance in this state; that it will accept a license therefor according to the laws of this state, and that said license shall cease and terminate in case, and whenever it shall remove or make application to remove into any United States court, any action or proceeding commenced in any of the state courts, of this state, upon any claim or cause of action arising out of any business transaction, in fact, done in this state; any permission, consent, agreement, condition or provision incorporated in any contract, mortgage, note, bond, obligation or policy of insurance authorizing or consenting to such removal, to the contrary notwithstanding.

"§ 2. Upon complying with the requirements of section one of this act, together with all other requirements now imposed by existing law, the auditor of public accounts shall issue to such incorporated company, association or partnership a license to transact its business in this state, and no such license shall be issued until all of said requirements shall have been complied with; and no such incorporated company, association or partnership shall carry on the business for which it may have been incorporated, within this state until it shall have obtained such license: the fee for such license shall be the same as that provided for by existing law, to be paid by the incorporated company, association or partnership so securing such license.

"§ 3. If any such incorporated company, association or partnership shall remove, or make application to remove into any United States court any action or proceeding commenced in any state court of this state upon a claim or cause of action arising out of any business, or transaction in fact done in this state although there may have been a stipulation authorizing such removal, or if it shall violate, or fail to comply with, any of the other requirements or conditions now imposed by existing law, it is hereby made the imperative duty of the auditor of public accounts, at once to revoke, cancel and annul the license issued to such incorporated company, association or partnership; and thereafter no such incorporated company, association or partnership shall transact within this state any of the business for which it was incorporated

until again fully licensed. In case such revocation of license shall be made because of the removal of, or the attempt to remove any action from a state court of this state to any United States court no renewal of such license shall be made within three years after such revocation. Whenever any such license shall be revoked, the auditor of public accounts shall give notice of such revocation by mail, to the president and secretary of such corporation and shall also cause a notice of the same to be published three times in some weekly public newspaper, published in the City of Springfield. A certified copy of the order of removal, shall be sufficient evidence of the removal of any cause."

The answer of petitioner admits that it would be the duty of the state authorities under the foregoing statute to revoke respondent's license in case it attempted a removal of the action at law to the Federal court (*Rec.*, 30), and petitioner's counsel, in their brief (p. 6), even now argue in favor of the validity and effectiveness of the statute. The Supreme Court of Illinois seems impliedly to have upheld the statute in *People* v. *Pavey*, 151 Ill., 106.

VI.

The possibility of a multiplicity of suits against respondent for separate annual installments under the policy was additional ground for equity to take jurisdiction.

Boyce's Executors v. *Grundy*, 3 Peters, 210, 215.

Buzzard v. *Houston*, 119 U. S., 347, 352.

Bank of Kentucky v. *Stone*, 88 Fed., 383, 392.

Town of Springport v. *Teutonia Sav. Bank*, 75 N. Y., 397.

The power of the administratrix to make a final and conclusive election to take the commuted value under the policy without authorization by the Probate Court of Cook County, is at least doubtful. See *Washington* v. *Louisville and Nashville Ry. Co.*, 136 Ill., 49, at page 56, construing a pertinent Illinois statutory provision. The bill alleged lack of authority on the part of the administratrix to make such an election and alleged that she had demanded payment of both the first installment and the commuted value. It might well have been, and might be even now but for the existing decree, that the respondent would be subjected to a series of actions in different jurisdictions, for installments periodically falling due. There is no time limit in the policy barring actions upon it.

VII.

So, also, resort to equity was further sustainable on the ground that respondent might lose important evidence (*e. g.*, the testimony of the witness McCabe) through lapse of time..

Fuller v. *Percival*, 126 Mass., 381.
Schmidt v. *West*, 104 Fed., 272.

VIII.

Even assuming for the sake of argument that it was a clear error on the part of a court of equity to take jurisdiction of the case, it does not follow that the writ of *certiorari* should be granted. The case has no general nor far reaching consequences, in principle or otherwise. If it were submitted to a jury on this record the submission would be an idle form. The court would direct a verdict for re-

spondent on the almost undisputed facts. No verdict for petitioner could stand. Under such circumstances, harmless error would not be ground for the reversal of a judgment in favor of respondent, and it should not cause the issuance of a *certiorari*.

The questions in the case were almost entirely questions proper to be decided by a court and not by a jury.

Pleasants v. *Fant*, 22 Wall., 116.
Hendrick v. *Lindsay et al.*, 93 U. S., 143.
Oscanyan v. *Arms Co.*, 103 U. S., 261.
People's Savings Bank v. *Bates*, 120 U.S., 556.

IX.

Phoenix Ins. Co. v. *Bailey*, 13 Wall., 616, is the principal reliance of petitioner's counsel in support of the contention that a policy of insurance cannot be cancelled in equity after loss and action brought. The case does not take any such broad ground. It holds that in the absence of *special circumstances* equity will not take jurisdiction of such a suit for cancellation.

X.

Petitioner's counsel contend (*Brief*, p. 9), that under *Farmers' Loan & Trust Co.* v. *Lake Street Elevated R. R. Co.*, 177 U. S., 51, the state court had "*exclusive* jurisdiction over the subject-matter,"—whatever that expression of counsel may mean. There has been no injunction granted, and nothing has interfered with the jurisdiction of the state court over the action there pending. This

contention seems to be about the equivalent of a plea of *lis pendens*, which manifestly would not be good. The case cited is not in point. See

Stanton v. *Embry*, 93 U. S., 548, 554.
Ogden City v. *Weaver*, 47 C. C. A., 485, 489; 108 Fed., 564, 568.

It is respectfully submitted that the petition should be denied.

WM. G. BEALE,
For Respondent.